B

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1281

GRACE B. MARTIN AND CELIA KING,
Petitioners,

vs.

MARIAN SCHILLO, ADELE SCHILLO AND DOROTHY S. FISCHER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

EDWARD H. S. MARTIN,
Counsel for Petitioners.

INDEX

TABLE OF CASES, STATUTES AND RULES OF COURT CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1281

GRACE B. MARTIN AND CELIA KING,

Petitioners,

vs.

MARIAN SCHILLO, ADELE SCHILLO AND DOROTHY S. FISCHER

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Supreme Court of the United States:

Your petitioners, Grace B. Martin and Celia King, jointly and severally, pray that a writ of certiorari issue to review the judgment entered March 21, 1944 (R. 67), by the Supreme Court of Illinois in this cause.

Summary Statement of the Matter Involved

This cause involves the right of petitioners herein under the due process clause of Section 1 of the 14th Amendment to the Federal Constitution, to the protection of their title to real estate acquired by them as innocent purchasers for value without notice through a sheriff's sale on special execution of attached real estate owned by respondents

herein at the time of the levy of the attachment. The writ of attachment (R. 9) was issued at the suit of Edward H. S. Martin vs. respondents, in the Superior Court of Cook County, Illinois, based on his affidavit (R. 7) alleging several grounds of attachment in the alternative, except as to respondent Fischer, as to whom a single ground was alleged. Notice was published in accordance with the Illinois Attachment Act (R. 12), and it is admitted that copies of said notice (R. 11), mailed by the Clerk in accordance with the statute, were received by respondents Adele Schillo and Dorothy S. Fischer, but respondent Marian Schillo did not receive a copy of the published notice mailed by the Clerk to an incorrect address in New York City, instead of to the address given in the attachment affidavit. However, in the final judgment (R. 13) in the attachment suit, in which Martin petitioner here was a party, the court found that all three of said respondents "have been duly notified of the pendency of this suit by publication of notice and mailing a copy of same to each of them pursuant to statute in such case made and provided." That judgment was entered August 5, 1942. The special execution (R. 14-15) was issued August 7, 1942, and by the return of the sheriff thereon it appears that he sold the attached real estate by virtue thereof at public sale to petitioner Grace B. Martin for $2770.69, in full satisfaction of the said execution, and issued certificate of sale to her. December 18, 1943, the redemption period having expired, petitioner Grace B. Martin having sold and assigned to petitioner Celia King a one-fifth interest in said certificate of sale and the office of sheriff being vacant, the coroner of said Cook County executed and delivered a deed (R. 20) of said real estate to petitioners, one-fifth interest therein to Celia King and four-fifths interest to Grace B. Martin, said Celia King having paid $1500 for her said interest (R. 33).

February 16, 1944, the respondents here filed their petition (R. 16) in said attachment suit, reciting said judgment, special execution, sheriff's sale and coroner's deed, and alleging they were all void because (a) the affidavit for attachment alleged grounds in the alternative, (b) because of the misdirecting and failure of Marian Schillo to receive the notice mailed June 27, 1942, (c) because the publication notice did not state the attachment writ was executed or returned by the sheriff, and (d) because the undivided interests of the defendants were not sold separately. Said petition also alleges upon information and belief that petitioners here were not purchasers for value without notice, but knew, or were charged with notice of, all defects in the proceeding and that the judgment, sale and deed were void; admits that petitioners here are in possession of said real estate through their agent and receiving the rentals thereof; denies (Par. 8) respondents here are indebted to the plaintiff in the amount of said judgment, but states they are willing to pay the reasonable value of his services; prays (a) that petitioners here be made additional defendants; (b) that said judgment, sale and deed be declared null and void and said judgment be vacated; (c) that petitioners here be directed to execute a quit-claim deed conveying all interest in said real estate to respondents here; (d) that said agent be restrained from paying the proceeds of rent to plaintiff or petitioners here; (e) that respondents here be given leave to answer the complaint; and (f) for general relief in equity.

Said Superior Court entered an order March 10, 1944 (R. 24), making the petitioners here and their said agent parties. March 23, 1944 (R. 30), petitioners here moved to strike said petition in said Superior Court and dismiss the same for insufficiency in law and want of jurisdiction, alleging various reasons, including want of jurisdiction of

said Superior Court to grant relief against petitioners here on said petition filed more than thirty days after final judgment and after expiration of the time for review on appeal or writ of error; that granting the relief prayed or any part thereof would deprive petitioners here of property without due process of law, contrary to Section 1 of the 14th Amendment to the Federal Constitution; that the affidavit for attachment is in law sufficient and the allegation of grounds in the alternative was in accordance with the statute; that in view of the findings in the judgment it must be presumed that a valid affidavit for attachment was filed and that a copy of said notice was duly mailed to said Marian Schillo; that it was not necessary that said notice should have alleged the attachment writ was executed or returned; that the matters alleged in the petition are not proper as a basis for relief under motion in the nature of writ of error *coram nobis;* that it appears from the relief prayed that said petition of respondents here is a proceeding in chancery and respondents here have no right to prosecute the same in the attachment suit; that the alleged defects are such at most as merely to render the proceedings and judgment voidable, and not void, and therefore there was sufficient basis for the judgment.

April 25, 1944 (R. 33-34), said motion of petitioners here was overruled and April 26, 1944, they filed an answer, alleging (R. 32-33, and by reference R. 25-28) that the consideration paid for said property was adequate and sufficient to satisfy the judgment and execution in full, and as against respondents here, the value of said property at the time of the sale did not exceed the amount of sale; that Adele Schillo and Dorothy S. Fischer were each duly served with and received a copy of the publication notice, and it was recited in the judgment the court had jurisdiction of each and all of the respondents here by due publication and mail-

ing of notice; that the affidavit for attachment was sufficient to give the court jurisdiction; that the published notice was sufficient to give the court jurisdiction over respondents here; denies the allegations of want of jurisdiction contained in the petition of respondents here; alleges that relying on said judgment Grace B. Martin paid value at the sheriff's sale as recited in the return on the execution and Celia King paid $1500 for her one-fifth interest, and neither of them knew at the time of sale or deed, nor was charged with notice, of any defect in the proceedings, nor that the judgment, sale and deed were void or alleged to be void; that respondents here knew or had notice during or prior to July, 1942, of the pendency of the attachment proceedings and the attachment of real estate, and were notified of the proposed execution sale prior to sale, and were notified and knew of said sale during or prior to October, 1943; that the allegations in the pleadings on which said judgment was entered are true, and respondents here are no longer indebted to said plaintiff only because said judgment and indebtedness merged therein were fully satisfied by said sheriff's sale; (Par. 11) that after levy of attachment, but before judgment, respondents here, by their quit-claim deed without covenants of warranty conveyed to Alma C. McGeogh said real estate, and thereby divested themselves of all interest therein, and by reason of said deed and satisfaction, respondents here have not been harmed or damaged and their petition raises nothing but moot questions; (Par. 12) that the effect of the alleged defects in said petition as amended was at most to make the proceedings voidable, but not void, and not subject to being declared void or set aside on motion or petition not made or filed until more than one year after the entry of judgment; that as said petition was not filed until more than one year after entry of judgment, respondents here have failed to exercise due diligence, have been negligent and

have never had any valid defense against the claim merged in said judgment, and even if the proceedings can be treated as a proceeding in equity, the same furnishes no ground for relief at all nor order, judgment or decree in said cause, instead of in a separate suit or proceeding in equity.

Respondents here filed their motion (R. 35) to strike all except paragraph 11 of the answer of petitioners here, and with it filed their reply (R. 36, 29) to said paragraph 11, admitting the said conveyance to said McGeogh, but alleging that subsequently title was again vested in them by deed from said McGeogh dated January 20, 1944. May 5, 1944, petitioners here filed rejoinder to said reply and therein alleged (R. 36, and by reference R. 31) that respondents here obtained said deed from said McGeogh subsequently to the recording of said coroner's deed and after petitioners here were in possession of said real estate. Order was entered May 5, 1944 (R. 36-7), sustaining motion of respondents here to strike all except paragraph 11 of answer of petitioners here and to strike rejoinder of petitioners here, also carrying back motion to strike said rejoinder to their reply and striking that reply as immaterial, also carrying back said motion to strike to said paragraph 11 of said answer and striking said paragraph as immaterial.

Final order entered May 8, 1944 (R. 37-8), on motion of respondents here, recites that the court finds, orders and adjudges that the court has jurisdiction of the plaintiff and petitioners here; that the writ of attachment and purported levy thereof are null and void because not based on a sufficient affidavit for attachment and because no sufficient notice was published and mailed; that said judgment, special execution, levy and purported sheriff's sale and deed are null and void for want of jurisdiction; that said judgment is vacated and set aside; said execution

quashed and levy thereof declared of no effect; that petitioners here did not acquire and do not have, by virtue of said deed, any right, title or interest in said property.

Petitioners have appealed (R. 38-9) from said order of May 8, 1944, to the Supreme Court of Illinois, claiming there that said final order or decree deprived them of their property without due process of law, contrary to Section 1 of the 14th Amendment to the United States Constitution, and also alleging other grounds for reversal. That court affirmed (R. 59) on the alleged ground that the judgment, sale and deed were null and void for want of jurisdiction over the persons or property of respondents here because of the misdirection and non-receipt of the notice mailed to Marian Schillo certified by the clerk. However, a rehearing was granted (R. 60) by the Illinois Supreme Court, but it again affirmed (R. 67) March 21, 1945, because the attachment affidavit alleged grounds in the alternative (—— Ill. ——, not yet reported. For copies of opinions see appendix (pp. 15, 19)). The opinion did not mention the Federal question, but sought to evade it by basing its decision on a ground obviously untenable and too narrow to eliminate the Federal question.

Jurisdiction

The Federal constitutional question was properly raised in the trial court by motion to dismiss (R. 30), not waived by answer (*Waters* v. *Heaton*, 364 Ill. 150, 153), and in the Illinois Supreme Court by brief (R. 41, 44-5), The overruling of the motion (R. 33-4) and final judgment of the trial court (R. 37-8) and the judgment of affirmance necessarily decided it adversely to petitioners here. Admittedly, on the record, petitioners here are innocent purchasers for value without notice—their pleadings alleging them to be such (R. 33 and by reference R. 26) having been stricken

as immaterial (R. 36-7)—unless the record proper in the Supreme Court showed defects rendering the judgment not merely voidable, but *absolutely void*—for the time for attack based on merely voidable defects had long since expired before petitioners here received their deed. (§§ 1, 2 and 3, Ill. Laws, 1933, p. 678; §§ 82, 83 and 84, Ch. 77, Smith-H. Ill. Ann. Stat., pp. 313-4, substituting thirty days from date of judgment in place of judgment term with respect to finality of judgment, and right to vacate or modify same. *Baldwin* v. *McClelland*, 152 Ill. 42, 49-51; *Trigg* v. *Ind. Com.*, 364 Ill. 581, 587-8; *M. & K. Bk.* v. *C.-C. C. Co.*, 351 Ill. 180, 190-2; *Gray* v. *Ames*, 220 Ill. 251, 255-6; *Tosetti B. Co.* v. *Koehler*, 200 Ill. 369, 372-4; *City* v. *Smale*, 248 Ill. 414, 416-7; In re Met. T. Co., 218 U. S. 312, 320-1; *Brooks* v. *B. & S. R. Co.*, 102 U. S. 107; *Voorhees* v. *Bk. of U. S.*, 35 U. S. 449, 470-8).

As to allegations in the alternative in the attachment affidavit, there are two Illinois statutes which are material and which the Supreme Court of Illinois did not construe nor hold void, but merely ignored. One of these, § 28, Ch. 11, Ill. Rev. Stats., §28, Ch. 11, Smith-H. Ill. Ann. Stats., p. 145, a part of the Attachment Act itself, provides that:

> "No writ of attachment shall be quashed, nor the property taken thereon restored, * * * on account of any insufficiency of the original affidavit, * * * if the plaintiff * * * shall cause a legal and sufficient affidavit * * * to be filed."

In passing on this or a previous similar statute, the Supreme Court of Illinois has held that anything defective which can be amended is not void, but merely voidable, such as defective affidavits in attachment. (*Booth* v. *Rees*, 26 Ill. 45, 48-9; *Hogue* v. *Corbit*, 156 Ill. 540, 544-5.) This applies to an affidavit not positive, but on information and belief. (*Booth* v. *Rees*, 26 Ill. 45, 48-9.) It also applies to a docu-

ment in the form of an affidavit, but having the jurat unsigned. (*Kruse* v. *Wilson*, 79 Ill. 233, 237-8.)

These cases are not *contra* to *Dyer* v. *Flint*, 21 Ill. 80, and *Archer* v. *Claflin*, 31 Ill. 306, cited in the decision of the State Supreme Court, for the latter two were decided on direct review *inter partes*, with no rights of third parties involved, and are inapplicable here.

The other statute is a section of the Illinois Civil Practice Act, expressly authorizing pleading in the alternative and providing that a bad alternative shall not make the other alternatives bad. (§ 43(2), Ch. 110, Ill. Rev. Stats.; Ill. Laws 1933, p. 784, Art. 6, § 43; § 167(2), Ch. 110, Smith-H. Ill. Ann. Stats., p. 270.)

In Illinois there are two sets of pleadings in attachment suits, one on the merits and the other on the attachment. In the latter set, the affidavit for attachment is the plaintiff's first pleading and the answer traversing the attachment affidavit is the first pleading of the defendant.

> "The defendant may answer, traversing the facts stated in the affidavit upon which the attachment issued, which answer shall be verified by affidavit; and if, upon the trial thereon, the issue shall be found for the plaintiff, the defendant may answer the complaint," (§ 27, Ch. 11, Ill. Rev. Stats.; Ill. Laws 1935, p. 210, § 1; Smith-H. Ill. Ann. Stats., 1944 Pocket Part, p. 18.)

As it does not conflict with any provision of the Attachment Act, Section 43 of the Civil Practice Act with respect to pleading in the alternative is made applicable by Rule 2 of the Supreme Court of Illinois, which reads:

> "In the actions referred to by section 1 and subsection (2) of section 31 of the Civil Practice Act, the separate statutes shall control, to the extent to which they regulate procedure in such actions, but the Civil Practice Act shall apply to matters of procedure not so regulated by separate statutes." (355 Ill. 13).

No statement is to be found in the Attachment Act as to whether the grounds for attachment shall be alleged conjunctively or disjunctively.

The Supreme Court of Illinois professedly based its decision on the sole point of alternative allegations. Its decision obviously being untenable on that basis and there remaining no non-Federal ground on which the affirmance could be based, petitioners' contention that they were deprived of their property without due process of law, contrary to the 14th Amendment to the Federal Constitution, was necessarily overruled, and a case is presented which may be reviewed on certiorari. (*Lawrence* v. *Tax Com.*, 286 U. S. 276, 282-3; *Postal T. C. Co.* v. *City*, 247 U. S. 464, 473-6; *Ward* v. *Bd. of County Com.*, 253 U. S. 17, 22-3; *Broad R. P. Co.* v. *State*, 281 U. S. 537, 540-1; *Ancient E. A. O.* v. *Michaux*, 279 U. S. 737, 744-6; *Davis* v. *Wechsler*, 263 U. S. 22, 24-5; *Grayson* v. *Harris*, 267 U. S. 352, 358; *W. C. S. R. Co.* v. *People*, 201 U. S. 506, 519-20; *C. B. & Q. R. Co.* v. *People*, 200 U. S. 561, 579-81; *McCullough* v. *Com. of Va.*, 172 U. S. 102, 109-11, 116-18, 122-3; *Abie S. Bk.* v. *Weaver*, 282 U. S. 765, 773; *Stewart* v. *Michigan*, 232 U. S. 665, 670-1; *Rogers* v. *Alabama*, 192 U. S. 226, 230-1; *Fayerweather* v. *Ritch*, 195 U. S. 276, 277-9; *Brinkerhoff-F. T. & S. Co.* v. *Hill*, 281 U. S. 673, 679-80.)

The fact that Marian Schillo did not receive the notice mailed to her by the clerk at the wrong address is not sufficient to negative the mailing of another notice to her by the clerk within the statutory time limit, which would justify the finding in the attachment judgment (R. 13) that the court had jurisdiction of her by due publication and mailing of notice. By a long line of Illinois decisions, a clerk's certificate of mailing is not the only evidence of mailing, and where insufficient in itself, like an unserved summons, to show proper service, a finding of due service in the judg-

ment is sufficient to show jurisdiction, where, as in the instant case, there was ample time for service of another summons or notice, even though the latter is not found in the files. (*Matthews* v. *Hoff*, 113 Ill. 90, 95-8; *Kuzak* v. *Anderson*, 267 Ill. 609, 613-4; *Pine T. L. Co.* v. *C. S. & G. Exch.*, 238 Ill. 449, 455; *Pierce* v. *Carleton*, 12 Ill. 358, 363-4; *Reedy* v. *Camfield*, 159 Ill. 254, 261; *Stack* v. *People*, 217 Ill. 220, 234; *Sloan* v. *Graham*, 85 Ill. 26, 28-9; *Barnett* v. *Wolf*, 70 Ill. 76, 79-83.)

As to the point that the publication notice was defective in not describing the property levied upon or alleging that the attachment had been levied, such showing is unnecessary in Illinois. (*Pine T. L. Co.* v. *C. S. & G. Exch.*, 238 Ill. 449, 453-4; *Lawver* v. *Langhans*, 85 Ill. 138, 140-1; *Morris* v. *Trustees*, 15 Ill. 266, 270-1.)

The respondents' other point, that the sheriff's sale was void because the undivided interests of the three co-tenants were sold together, instead of separately, is frivolous. No statute requires such interests to be sold separately.

As shown in the authorities first cited herein under "Jurisdiction", when respondents here filed their petition the Superior Court had long since lost jurisdiction of the parties and subject-matter in the suit in which that petition was filed. Therefore, when the Superior Court entertained that petition and sought to deprive petitioners here of their property rights, it deprived them of their property without due process of law, contrary to the 14th Amendment to the Federal Constitution. (*Brinkerhoff-F. T. & S. Co.* v. *Hill*, 281 U. S. 673, 679-80; *C. B. & Q. R. Co.* v. *City*, 166 U. S. 226.)

The Questions Presented

1. Whether, in spite of the prohibition of Section 1 of the 14th Amendment to the Constitution of the United States against deprivation of property without due process of law,

a real estate title acquired through an execution sale and deed thereunder by petitioners here—the purchaser for value and her assignee for value—where neither of them was a party to the suit in which that execution issued, nor had notice or knowledge of any defect in that suit, may be held null and void and the judgment, sale and deed set aside, where there were no defects in the proceedings which would have rendered them void and not merely voidable.

2. Whether there was any such defect in the suit here involved.

3. Whether, as in the instant suit, after a suit has ended and the trial court according to repeated uniform decisions of the Illinois Supreme Court has lost jurisdiction to vacate its judgment not absolutely void, as distinguished from merely voidable, that trial court may afterwards set aside that judgment and declare void the title previously acquired by innocent purchasers for value, not parties to the suit when acquiring title or previously, who purchased in reliance upon said judgment without notice of anything not appearing of record, and the Supreme Court of the State may disregard its long established rule and affirm such decision, without depriving said purchasers of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Reasons Relied On for Allowance of Writ

By affirming the judgment appealed from, the Supreme Court of Illinois has necessarily decided Federal questions of substance in a way not in accord with applicable decisions of the Supreme Court of the United States, namely, the first two questions hereinbefore stated as the questions presented. (*Voorhees* v. *Bk. of U. S.*, 35 U. S. 449, 470-8; *Cooper* v. *Reynolds*, 77 U. S. 308, 315-16, 319-21). Under the Illinois Civil Practice Act (§ 43(2), Ch. 110, Ill. Rev.

Stats.; Ill. Laws 1933, p. 784, Art. 6, § 43; § 167(2), Ch. 110, Smith-H. Ill. Ann. Stats., p. 270), hereinbefore referred to, authorizing pleading in the alternative, the attachment affidavit was not even defective. Under the Illinois Attachment Act (§ 28, Ch. 11, Ill. Rev. Stats.; § 28, Ch. 11, Smith-H. Ill. Ann. Stats., p. 145) and the numerous Illinois decisions hereinbefore cited, such alternative allegations, even if defective, made the judgment voidable only, and not absolutely void. Under a rule of property long adhered to, which could not be departed from without disaster to the vast number of real estate titles derived through court proceedings, the title of innocent purchasers for value without notice of any defects in the proceedings cannot be disturbed on the basis of defects which would render them merely voidable and not absolutely void. This is well established by the Illinois decisions (*Hogue* v. *Corbit,* 156 Ill. 540, 544-5; *Iroquois F. Co.* v. *Wilkin Mfg. Co.,* 181 Ill. 582, 592), as well as the decisions of this Court (*Voorhees* v. *Bk. of U. S.,* 35 U. S. 449, 470-8; *Cooper* v. *Reynolds,* 77 U. S. 308, 315-16, 319-21). Especially is this so when the attack originated long after the time for applying to a court of review or for relief in the trial court term or its equivalent had expired. (Cases first cited under "Jurisdiction" in this petition.)

The necessary effect of said affirmance by the Illinois Supreme Court was to decide a Federal question of substance not theretofore determined by this Court, namely, whether, as in the instant suit, after a suit has ended and the trial court according to repeated uniform decisions of the Illinois Supreme Court, has lost jurisdiction to vacate its judgment not absolutely void, as distinguished from merely voidable, that trial court may afterwards set aside that judgment and declare void the title previously acquired by innocent purchasers for value, not parties to the suit when acquiring title or previously, who purchased in reliance upon

said judgment without notice of anything not appearing of record, and the Supreme Court of the State may disregard its long established rule and affirm such decision, without depriving said purchasers of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. The decision of such question by this Court, indicating whether such purchasers will be protected by the 14th Amendment aforesaid in relying on such judgments, is of sufficient general importance to make the allowance of certiorari desirable.

The Supreme Court of Illinois cannot, by remaining silent as to the Federal question of due process of law and basing its decision on a non-Federal ground, untenable or not broad enough to sustain its decision, deprive this Court of its right to determine for itself the Federal questions necessarily decided by the judgment of affirmance against the Federal right claimed. (*C. B. & Q. R. Co.* v. *People,* 200 U. S. 561, 579-81; *McCullough* v. *Com. of Va.,* 172 U. S. 102, 109-10, 116-18, 122-3; *W. C. S. R. Co.* v. *People,* 201 U. S. 506, 519-20; *Ward* v. *Bd. of County Com.,* 253 U. S. 17, 22-3).

There was no other non-Federal ground upon which the judgment of the Supreme Court of Illinois was or could have been based broad enough to have sustained that judgment. The failure of Marian Schillo to receive the notice which was misdirected by the clerk was immaterial, in view of the finding in the attachment judgment that the court had jurisdiction by due publication and mailing of notice to each of the defendants. (*Pine T. L. Co.* v. *C. S. & G. Exch.,* 238 Ill. 449, 455; *Vil.* v. *Homesteaders' L. Assn.,* 367 Ill. 508, 512; *Kuzak* v. *Anderson,* 267 Ill. 609, 613.)

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioners.